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IN THE

Supreme Court of the United States

OCTOBER TERM, 1978

No. 78-96

LODGE 1858, AMERICAN FEDERATION OF GOVERNMENT EMPLOYEES, *et al.*, *Petitioners*

v.

ADMINISTRATOR, NATIONAL AERONAUTICS & SPACE ADMINISTRATION, *et al.*, *Respondents*

and

NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES, *Intervenor-Respondent.*

On Petition for Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

BRIEF OF INTERVENOR-RESPONDENT NATIONAL COUNCIL OF TECHNICAL SERVICE INDUSTRIES IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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This Brief is submitted on behalf of the Intervenor-Respondent National Council of Technical Service Industries ("NCTSI") in opposition to petitioners' request that a writ of *certiorari* issue to the United

States Court of Appeals for the District of Columbia Circuit.[1]

In their petition, petitioners have set forth a misleading and highly inflammatory description of the opinion below and of its significance. Contrary to petitioners' assertions, this is not a case which marks the death knell of the civil service system at the National Aeronautics and Space Administration ("NASA") or elsewhere in the Federal Government; it is not a case which permits the Government to contract out vast portions of its regular, day-to-day civilian governmental work functions to the detriment of the civil service; and it is not a case in which the Court of Appeals' decision conflicts with any decision of this Court or, for that matter, of any Court. To the contrary, as we will show herein, the Court of Appeals has set forth a well-reasoned analysis of the applicable provisions of the Space Act of 1958 and when, consistent with that statute and the decisions of this Court, improper administration of Government contracts may render such contracts unlawful.

Because the petition for *certiorari* filed herein contains significant misstatements of fact as to the matters in dispute and the proceedings below, we have set forth a detailed counterstatement of the case before setting forth the reasons why a writ of *certiorari* should not issue in this case.

[1] NCTSI is an association of companies which provides a substantial amount of the more than $8.5 billion of support services which various Government agencies secure by contract from private industry each year.

COUNTERSTATEMENT OF THE QUESTIONS PRESENTED

1. Whether the Court of Appeals correctly held that Section 2473(b)(5) of the Space Act, 42 U.S.C. § 2473(b)(5), authorizes NASA to enter into "support service" contracts?[2]
2. Whether the Court of Appeals correctly held that neither Section 2473(b)(2) of the Space Act, 42 U.S.C. § 2473(b)(2), nor the Federal civil service laws render support service contracts entered into by NASA with private contractors illegal *per se*?
3. Whether the Court of Appeals correctly held that lawful support service contracts may be rendered unlawful if they are improperly administered by NASA?
4. Whether the Court of Appeals correctly held that NASA did not improperly administer its support service contracts at the Marshall Space Flight Center?

[2] The "support service" contracts in issue in this case run the gamut of tasks, ranging from the performance of complex analytical and scientific missions (*e.g.*, engineering analysis, design performance analysis) to the performance of housekeeping tasks at the Marshall Space Flight Center (*e.g.*, medical, security, and transportation services). The scope of these services as performed for the Government as a whole by private industry has been described by the predecessor to the Office of Management and Budget as "infinite":

> "There is virtually an infinite variety of services the different agencies require in carrying out their assigned missions. They range all the way from mundane activities such as guard and window washing services on through to an activity as unique and complex as that of moving a 6-million pound Saturn rocket, 360 feet high, in an upright position, from an assembly building to a launching pad 3 miles away, by means of a giant 'crawler' . . . ." Hearings Before a Subcommittee of the House Committee on Government Operations, 90th Cong., 2d Sess. p. 34 (1968).

COUNTERSTATEMENT OF THE CASE

This case involves a challenge by civil service employees and their labor organizations to the means by which NASA performs its various functions at the Marshall Space Flight Center ("MSFC") in Huntsville, Alabama. Since NASA's establishment, the support services essential to the performance of its missions have been performed in two ways: (1) by civil service employees pursuant to the authorization of the Federal civil service laws; and (2) by contracts with private companies which, pursuant to the authorization of the Federal procurement laws, agree to of which of these two systems to use has been made perform certain tasks for NASA. The determination by NASA since its formation in 1958 after review of a host of complex policy considerations, such as comparative costs and availability of resources in the private and public sectors. The use of these parallel and complementary systems has resulted in the development since 1958 of a "Government/Industry/Education Space team" at NASA which has been used effectively to accomplish NASA's critical tasks.[3]

The Procedural Background of the Case

This case was brought after an announcement by NASA on December 6, 1967, of a reduction in force ("RIF") of certain civil service employees employed at MSFC. In their complaint, the plaintiffs did not assert that the RIF violated the specific statutes and regulations applicable to RIFs. Instead, the plaintiffs

[3] (Appendix, p. 13a.) All citations in this Brief to "Appendix" are to the opinion of the Court of Appeals filed with the petition. References to the "Joint Appendix" are to the Joint Appendix submitted below.

claimed that, while the RIF was being conducted, NASA had in existence contracts for certain support services at MSFC being performed by private companies. The plaintiffs asked that these contracts be declared unlawful.

On April 28, 1968, the District Court dismissed the complaint for lack of standing and failure to exhaust administrative remedies. On April 21, 1970, the Court of Appeals (per Circuit Judges Robinson and Tamm) reversed the District Court's decision and remanded the matter to the District Court. 141 U.S. App. D.C. 152, 436 F.2d 882. In an extensive opinion, Circuit Judge Robinson held that the plaintiffs had standing to maintain this action.[4]

Upon remand to the District Court, the parties filed cross motions for summary judgment. On November 30, 1973, the District Court issued partial summary judgment in favor of the plaintiffs. In this decision, the Court found that support service contracts could in certain instances violate Federal civil service laws and the Space Act of 1958. The Court referred the question of whether the specific MSFC contracts in issue violated these laws to the Civil Service Commission and, after specifying the standards to be applied, directed the Commission to investigate the contracts and report to the Court.

Based on this order, the Civil Service Commission conducted an exhaustive investigation of the MSFC support service contracts. On May 30, 1974, the Commission filed an extensive report of its investigation

[4] Circuit Judge Robinson stressed in his opinion that no view was being expressed by the Court of Appeals as to any aspect of the merits of the case. Circuit Judge Tamm concurred.

with the District Court. This report concluded that all of the contracts in issue at MSFC were lawful and that none of the contractor personnel were treated as "employees" of NASA.

In September 1975, the various parties again filed motions for final summary judgment. On August 12, 1976, the District Court entered final summary judgment. In this decision, the Court held that, notwithstanding the contrary findings of the Civil Service Commission, 22 of the 32 support service contracts at MSFC (and portions of two others) were unlawful.

The Court of Appeals Decision in Issue

On March 20, 1978, the Court of Appeals (per Circuit Judges MacKinnon and Robb)[5] reversed the judgment of the District Court and ordered the complaint herein dismissed.[6] In an exhaustive opinion, the Court held that all of the MSFC contracts in issue were lawful.

According to the Court of Appeals, that NASA "was authorized to enter into support service contracts . . . is beyond serious dispute." (Appendix, p. 16a.) The Court held that Section 2473(b)(5) of the Space Act,

[5] Mr. Justice Clark heard oral argument, but died before the decision of the Court of Appeals was announced.

[6] Petitioners have repeatedly contended in their petition that the 1978 opinion in issue here was somehow at odds with the Court of Appeals' 1970 decision. This is, of course, a somewhat novel basis for seeking *certiorari* from this Court. It is also, as a reading of both decisions will show, without merit. In any event, the best answer to this contention is that, on April 19, 1978, a suggestion for rehearing *en banc* of the 1978 decision was denied by the entire panel of the Court of Appeals with no Judge in the Circuit voting to the contrary.

42 U.S.C. § 2473(b)(5), provided "specific statutory authority" for NASA to enter into such contracts and that nothing in the Act rendered such contracts illegal *per se*.[7] (*Id.*, p. 15a.)

The Court recognized that another section of the Space Act, 42 U.S.C. § 2473(b)(2), required that NASA's "employees" be appointed in the civil service of the United States.[8] However, the Court held that this provision was not at odds with the authority granted in Section 2473(b)(5) of the Space Act to enter into support service contracts: "it covers a different situation altogether" and was, according to the Court, a recognition of the complementary roles at NASA envisioned by Congress for the civil service and private industry. (Appendix, pp. 14a-15a.)

At the same time, the Court of Appeals noted that, although the provisions of the Space Act dealing with contracts and the civil service were complementary, support service contracts could violate Section 2473(b)(2) and the civil service laws if the contracts were "improperly administered" and "used to circumvent" the civil service laws. (Appendix, pp. 15a, 17a.) This meant, according to the Court, that a lawful contract could be rendered unlawful if "NASA treats the em-

[7] For ease of reference, we will refer to this provision as Section 2473 of the Space Act since this is the reference used by the Court below. The official citation, in light of a recent recodification, is Section 203(b)(2), Pub.L. No. 85-568, 72 Stat. 426, 42 U.S.C. § 2473(c). Section 2473(b)(5) is set out in full in the appendix to the petition.

[8] Subsection (b)(2) contains an exception, not material here, which permits the Administrator of NASA to appoint up to 424 "employees" without regard to the requirements of the civil service laws.

ployees of the contractor as subsection (b)(2) appointed employees . . . ." (*Id.*, p. 15a.) Put another way, the Court of Appeals held that contracts were lawful "so long as the contractor's employees are not treated [by NASA] as employees within the meaning of the civil service laws." (*Ibid.*)

The Court then held that the key factor in determining whether contracts were improperly administered and contractor employees made into *de facto* Government "employees" was the extent to which Government personnel "supervised" the physical conduct of contractor's employees so that such employees became, in effect, Government "employees." (Appendix, p. 18a.)[9] Applying this Court's definition of supervision in *Kelly* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), the Court exhaustively reviewed the facts with respect to the MSFC contracts in issue and found that supervision by NASA of support service contractor employees did *not* exist; that there was a "classic independent contractor relationship" between the contractors and NASA at MSFC; and that, therefore, none of the contractor employees had been treated as "employees" of NASA within the meaning of subsection (b)(2). (*Id.*, p. 21a.) According to the Court:

[9] The Court reasoned that:

"Employees are distinguished from independent contractors most basically by the detail with which the party for whom the work is eventually produced actually supervises the manner and means by which the work is performed; and *degree of control* or *supervision* is the principal element that differentiates employees and independent contractors at common law, in the state statutory context, and in the context of other federal statutes as well." (Appendix, pp. 18a-20a.) (Footnotes omitted.) (Emphasis in original.)

> "The situation here involves NASA entering into written contracts with various companies to perform special services. In each contract, NASA looked to the company that hired the individuals to perform certain tasks. However, the individual companies, not NASA, were to furnish the necessary management and personnel. *It was the responsibility of each company to supervise, control and direct the performance of its own employees in fulfilling the contract's requirements.* These contracts required the companies to exercise their independent judgment. *This is the classic independent contractor relationship.*" (*Ibid.*) (Emphasis supplied.)[10]

Based on the foregoing, the Court of Appeals concluded that the 32 MSFC contracts in issue were fully lawful in all respects and ordered the complaint herein dismissed.

REASONS WHY THE WRIT SHOULD NOT BE GRANTED

In their petition to this Court, petitioners advance a host of reasons why a writ of *certiorari* should be issued in this case. We respectfully submit that, putting the somewhat hysterical rhetoric of the petition to one side, there is no basis for the issuance of *certiorari* and review of the Court of Appeals' decision.

[10] In addition to conducting its own analysis of the MSFC contracts, the Court noted that the District Court had directed the Civil Service Commission to conduct an exhaustive investigation of the MSFC contracts and that, based on that investigation, the Commission had concluded that every MSFC contract was properly administered and fully lawful. According to the Court, there was "substantial support in the record" for the Commission's conclusions and, therefore, no basis for the District Court to have rejected the Commission's findings with respect to the contracts. (Appendix, pp. 28a-29a.)

A. THE COURT OF APPEALS CORRECTLY HELD THAT NASA HAS BROAD AUTHORITY TO ENTER INTO SUPPORT SERVICE CONTRACTS

Petitioners challenge the conclusion of the Court of Appeals that NASA may appropriately enter into support service contracts to perform those of its functions which it considers may best be performed by private industry. In petitioners' view, no such authority exists and all NASA service functions must be performed by the civil service. However, the Space Act and its legislative history fully supports the Court of Appeals' conclusion that NASA's "authority to enter into support service contracts . . . is beyond serious dispute." (Appendix, p. 16a.)

As the Court of Appeals recognized, NASA's authority to enter into support service contracts is found in the Space Act of 1958. This statute states, in no uncertain terms, that:

> "In the performance of its functions . . . [NASA] is authorized— . . .
>
> "(5) . . . *to enter into and perform such contracts,* leases, cooperative agreements, or other transactions *as may be necessary in the conduct of its work and on such terms as it may deem appropriate,* with any . . . person, firm, association, corporation, or educational institution." 42 U.S.C. § 2473(b)(5). (Emphasis supplied.)

According to the Court of Appeals, the legislative history of this provision makes clear that it means exactly what it says. The Space Act was intended to create an agency with power "to move with decision and dispatch" and with a "minimum of redtape" and made certain that NASA would have "the highest degree of flexibility" in its operations.[11] The reason for this was clear: as the Court of Appeals noted, the establishment of NASA "embodied the American response to the shattering effect that the Soviet's Sputnik had on our international stature in the post-World War II era." (Appendix, p. 11a.) Thus, the bill establishing NASA was designed to "invoke the participation of private industry and of educational institutions in embarking on the nation's space effort." (*Id.,* p. 12a.)

In establishing NASA, Congress expressly intended that NASA would have a small number of civil servants so that, in Speaker McCormack's words, "the full benefit of this expanding program will accrue to private enterprise":

> "According to NA[S]A witnesses, *the contemplated expansion of functions under the new agency will take place largely by means of contract work rather than through research conducted by the agency itself.* At present, the NA[S]A employs approximately 8,000 people. The NA[S]A witnesses estimated that the increase in agency personnel would not be more than several hun-

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[11] Representative Keating, a member of the House Select Committee on Astronautics and Space Exploration, stated that:

> "You will also find that the bill vests sufficient concentration of authority in a single Administrator to give that office the ability to move with decision and dispatch—in short, to get the job done. This is highly important, for a minimum of redtape—in light of the speed of modern-day communications and development—is an absolute must. The Space Administrator's hands cannot be tied if we expect to get results from our space program." 104 Cong. Rec. 9928 (1958).

See also 104 Cong. Rec. 11295 (1958) (remarks of Senator Bridges).

> dred. Even with considerable allowance for error in their estimate, it seems likely that the number of new Federal employees in the near future will be relatively small. *In other words, the full benefit of this expanding program will accrue to private enterprise.*" 104 Cong. Rec. 9918 (1958). (Emphasis supplied.)

Based on this clear intention, Congress gave NASA in Section 2473(b)(5) the broadest power to contract for support services. The 1958 bill provided simply, and without proviso, limitation, or qualification, that NASA was empowered "to enter . . . such contracts . . . as may be necessary . . . with any [federal or state agency] . . . or with any person, firm, association, corporation, or educational institution" and on such terms "as [NASA] deems appropriate." Indeed, this grant of power was viewed as so expansive that the House Select Committee considering the bill was concerned with its breadth and stated that:

> "This very important and far-reaching grant of power deserves more study." House Select Comm. on Astronautics and Space Exploration, H.R. Rep. No. 1758, 85th Cong., 2d Sess. 50 (1958).

Nevertheless, the basic provision was enacted into law without change (a provision recognizing small business was added).

In short, contrary to petitioners' assertions, there is full support for the Court of Appeals' conclusion that "specific statutory authority" exists for NASA to have entered into the support service contracts in issue here. (Appendix, p. 15a.)

B. THE COURT OF APPEALS CORRECTLY HELD THAT NOTHING IN THE SPACE ACT OR THE FEDERAL CIVIL SERVICE LAWS RENDERED THE SUPPORT SERVICE CONTRACTS IN ISSUE HERE UNLAWFUL

Petitioners contend that the Court of Appeals erred because the Federal civil service laws and section 2473(b)(2) of the Space Act render the MSFC support service contracts in issue here unlawful. Once again, however, this assertion will not withstand scrutiny and affords no basis for review of the Court of Appeals' decision.

1. Neither Section 2473(b)(2) of the Space Act nor the Federal Civil Service Laws Render Support Service Contracts Unlawful Per Se

As the Court of Appeals held, there is nothing in either Section 2473(b)(2) of the Space Act or the Federal civil service laws which renders support service contracts unlawful.

Section 2473(b)(2) of the Space Act, 42 U.S.C. § 2473(b)(2), provides as follows:

> "In the performance of its functions . . . [NASA] is authorized— . . .
>
> "(2) *to appoint and fix the compensation of such officers and employees as may be necessary* to carry out such functions. *Such officers and employees shall be appointed in accordance with the civil-service laws* and their compensation fixed in accordance with chapter 51 and subchapter III of chapter 53 of Title 5, except that (A) to the extent the Administrator deems such action necessary to the discharge of his responsibilities, he may appoint not more than four hundred and twenty-five of the scientific, engineering and administrative personnel of the Administration with-

> out regard to such laws, and may fix the compensation of such personnel not in excess of the highest rate of grade 18 of the General Schedule . . . ." (Emphasis supplied.)[12]

On its face, this provision says absolutely nothing about contracting for support services. And, the legislative history of this section makes clear that contracting for support services was never even considered by Congress when Section 2473(b)(2) was enacted. As the Court of Appeals noted, this section of the statute on its face deals with "appointed employees" of NASA, not with contracts, contractors or their employees. (Appendix, p. 14a.)

The Court of Appeals appropriately recognized that sections 2473(b)(2)—dealing with the appointment of civil servants at NASA—and 2473(b)(5)—dealing with contracts at NASA—were not contradictory provisions, but were complementary: "[s]ubsection (b)(5) is more than an exception to subsection (b)(2); it covers a different situation altogether." (Appendix, pp. 14a-15a.) As the Court put it, accepting petitioners' argument that subsection (b)(2) applied to contracts "would effectively read subsection (b)(5) out of the act." (*Id.*, p. 16a n.21.)[13] According to the Court of Appeals:

[12] As the Court of Appeals noted, the exception in subsection (b)(2) relating to 425 "employees" who need not be appointed in the civil service "was intended to enable NASA to recruit qualified scientists, engineers and other personnel on a prompt basis without regard to civil service limitations." (Appendix, p. 10a.) *See* H.R. Rep. No. 1170, 85th Cong., 2d Sess., 1958 U.S. Code Cong. & Admin. News 3178.

[13] As we will show below, petitioners' citation to the Court's decision in *United States* v. *Langston*, 118 U.S. 389 (1886), in support of their case is in error. Indeed, *Langston* supports the

> ". . . the contractors' employees have not been shown . . . to be employees of the United States who must be appointed in accordance with subsection (b)(2) and concomitantly as civil service employees under the civil service laws. This is because subsection (b)(5) validly authorized NASA to enter into separate contracts under which certain services contracted for were performed by employees of the contractor. . . . Subsection (b)(5) need not 'repeal' subsection (b)(2) in order to achieve its separate status. To the extent that it provides for a *specific* manner in which NASA may carry out some of its work, it is a specific exemption from the general provisions of subsection (b)(2) and must be recognized as such." (*Id.*, pp. 29a-30a.) (Emphasis in original.)

The same conclusion follows when one examines the Federal civil service laws. The civil service laws define an "employee" as follows:

> ". . . an officer and an individual who is—(1) *appointed in the civil service* . . . ; (2) engaged in the performance of a Federal function under authority of law or an Executive act; *and* (3) subject to the supervision of an individual named in paragraph 10 of this subsection [*e.g.*, the President] while engaged in the performance of the duties of his position." 5 U.S.C. § 2105. (Emphasis supplied.)

By definition, therefore, a contractor's employee not "appointed" in the civil service is not an "employee" for purposes of the civil service laws.

Court of Appeals' interpretation of these two provisions of the Space Act since, as the Court there noted, "[i]f by any reasonable construction they [statutory provisions] can be made to stand together, our duty is to give effect to the provisions of each." 118 U.S. at 393.

Indeed, this is made even clearer in the statutes and regulations governing RIFs. Congress has directed the Civil Service Commission to "prescribe regulations for the release of *competing employees* in a reduction in force . . ." 5 U.S.C. § 3502(a). (Emphasis supplied.) In addition, Congress has specified that certain civil service employees—called "preference eligibles" [14]—shall be entitled to additional rights in a RIF "in preference to competing employees." 5 U.S.C. § 3502(b).

On their face, these RIF rights relate only to civil service "employees" as defined by law. Indeed, as this Court has held, the employment preference given to civil servants in a RIF is *a limited concept. See Elder* v. *Brannan,* 341 U.S. 277 (1951); *Fass* v. *Gray,* 197 F.2d 587 (D.C. Cir. 1952), *cert. denied,* 344 U.S. 839 (1952); *American Federation of Government Employees* v. *Resor,* 387 F. Supp. 63 (D.D.C. 1974). According to this Court, "the term 'competing' employee . . . necessarily implies that a veteran's preference operates only within a defined group." 341 U.S. at 283.[15]

Thus, these statutes and regulations make clear that nothing in the civil service laws renders support service contracts unlawful. In fact, this very interpretation of the civil service laws has been adopted by the Civil Service Commission. As a Civil Service Commission

[14] A preference eligible employee is defined as a veteran and his immediate family. *See* 5 U.S.C. § 2108(3), 7511.

[15] The petitioners here are, in effect, claiming that they are entitled to appointment to "jobs" held by employees of private contractors in a RIF. However, in *United States* v. *Testan,* 424 U.S. 392 (1976), this Court held that two civil service employees could not challenge their failure to be promoted since, under the civil service laws "one is not entitled to a position until he has been duly appointed to it." 424 U.S. at 402.

Examiner has stated, "[e]ven if a contract entered into by NASA . . . [were] found to be improper, this . . . [would] not make the employees of the private firm Federal employees and thus 'competing employees' under the law . . . ; a Federal employee has no right to displace or 'bump' an employee of the private firm." [16] Indeed, in the very appeals brought by civil service employees affected by the MSFC RIFs in issue here, the Civil Service Commission's Board of Appeals Review stated as follows:

> "A decision to carry out some of its functions by using other than federal civilian employees is a matter solely within the administrative discretion of the agency and the propriety of such a decision is not subject to review or modification by the Civil Service Commission in the adjudication of the reduction-in-force appeal of any federal civilian employee affected thereby." [17]

In sum, neither subsection 2473(b)(2) of the Space Act nor the Federal civil service laws render support service contracts unlawful *per se.*

2. The Court of Appeals Did Not Hold That NASA Appropriation Acts Repealed the Requirements of Section 2473(b)(2)

In an effort to create a conflict with a decision of this Court and better their chances for *certiorari,* petitioners contend that the Court of Appeals rested its decision that support service contracts were lawful on the fact that Congress appropriated funds annually for such contracts and had thereby "repealed" section 2473(b)(2). (Petition, p. 20.) It is contended that this

[16] Joint Appendix, p. 1551.

[17] Joint Appendix, p. 1503.

holding is inconsistent with this Court's opinion in *United States* v. *Langston,* 118 U.S. 389 (1886).

Petitioners' argument is nonsense. ***First,*** as even a cursory reading of the Court of Appeals' opinion shows, the Court of Appeals rested its decision about the legality of support service contracts upon a detailed analysis of the specific provisions and legislative history of the Space Act of 1958, not on any provision in subsequent NASA appropriation acts.

Second, the Court of Appeals nowhere held that NASA appropriation acts "repealed" any provision of the Space Act of 1958. The Court's own words on this subject speak for themselves:

> "Because of this background . . . 'NASA and MSFC officials apparently believed they had a mandate in the law to develop a Government/Industry/Education Space team.' . . . This practice was regularly disclosed to Congress in its budget requests and the resulting appropriations based thereon are an indication of congressional approval. If anything more were needed to approve the practice of using extensive support service contracts, it came in 1971 and 1972 when Congress directed reductions in NASA's *civil service* work force at the same time that it continued to approve its budget requests for funds to meet its obligations under its support service contracts that were in existence." (Appendix, pp. 13a-14a.) (Footnotes omitted.) (Emphasis in original.)

Third, the Court's reference to these appropriations statutes is perfectly appropriate since the fact that Congress was aware of NASA's contracting practices and approved them is significant. As one Court has noted:

> "a consistent administrative interpretation of a statute, shown clearly to have been brought to the attention of Congress and not changed by it, is almost conclusive evidence that the interpretation has congressional approval." *Kay* v. *Federal Communications Commission,* 443 F.2d 638, 646-47 (D.C. Cir. 1970.)[18]

Thus, there is no basis for petitioners' assertion that appropriation acts were improperly used by the Court of Appeals as a means of "repealing" a federal statute.

C. THE COURT OF APPEALS CORRECTLY HELD THAT THE CONTRACTS IN ISSUE WERE NOT IMPROPERLY ADMINISTERED BY NASA

While holding that support service contracts were not unlawful *per se,* the Court of Appeals recognized that there was an appropriate relationship between subsections 2473(b)(2) and (b)(5) of the Space Act which could render support service contracts unlawful in certain circumstances. As the Court put it, while NASA had broad authority to contract for services, it could not do so in a way to "evade and circumvent" subsection (b)(2) and treat "contractor's employees . . . as employees within the meaning of the civil service

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[18] Petitioners' contention that what the Court of Appeals did is in conflict with *United States* v. *Langston,* 118 U.S. 389 (1886), is without merit. In *Langston,* Congress had appropriated one amount as the salary for a consular official in Haiti. In subsequent statutes, a lower overall appropriation was provided for consular officials. The consular official in Haiti filed suit in the Court of Claims on the grounds that the subsequent appropriation acts had not reduced his salary. The Court agreed, finding as a matter of statutory construction that it was unlikely that Congress intended to reduce the official's salary without having expressly said so in the subsequent statutes.

laws." (Appendix, p. 15a.) According to the Court, the question was:

> "whether the contracts validly entered into under subsection (b)(5) were improperly administered so as to treat the contractor's employees as subsection (b)(2) employees which were required to be appointed in accordance with the civil service laws." (*Id.*, p. 17a.)

We believe that the Court of Appeals was correct in its analysis of the relationship between the two subsections and in answering this question by finding all of the MSFC contracts in issue lawful.

1. The Court of Appeals Applied the Proper Standard for Determining When Contracts are Administered Improperly

It is difficult to ascertain petitioners' precise complaint with the standard used by the Court of Appeals in reviewing the administration of the MSFC contracts, other than the fact that they do not like the result reached by the Court. We believe that the standard used by the Court, applying this Court's decision in *Kelly* v. *Southern Pacific Co.*, 419 U.S. 318 (1974), was clearly correct.

In the first instance, the Court of Appeals held that the determination of whether a contractor's employee was improperly treated by the Government as "an 'employee' within the meaning of the Civil Service laws" turned on the extent of Governmental *supervision* of the contractor's employee. (Appendix, pp. 17a-18a.) This is, of course, the key factor examined for many years by the Civil Service Commission in considering this very issue.[19] It was the key factor examined by the

[19] As the Court of Appeals noted, the Commission set forth its view of the standards applicable to assessing the legality of contract administration in a 1967 opinion by then General Counsel Pellerzi. (Appendix, p. 7a.) This opinion, as clarified by an opinion of a subsequent Commission General Counsel, stressed that supervision of contractor employees by Government personnel was "the *basic criteria* by which this relationship is judged . . . ." (*Id.*, p. 24a.) (Emphasis in original.)

District Court. And, even petitioners would appear to agree that supervision is the key. (Petition, p. 26.)

In determining the appropriate definition of "supervision", the Court of Appeals viewed this Court's decision in *Kelly* v. *Southern Pacific Co., supra,* "as strongly persuasive if not completely controlling on the facts here present." (Appendix, p. 24a.) In *Kelly,* this Court considered a claim under the Federal Employee's Liability Act submitted by an employee of a contractor with a railroad. In its opinion, this Court held that supervision of the contractor's employee by the railroad was the key and that proof of a "master-servant relationship" under common law principles was necessary before an employee of the contractor could be considered an "employee" of the railroad for purposes of the Act. 419 U.S. at 325. According to the Court, the question was whether one employer "controlled or had the right to control the physical conduct of . . . the employees [of the other] in the course of their operations." (*Ibid.*) Based on this standard, the Court of Appeals concluded that, for support service contracts to be rendered unlawful, day-to-day supervision of the physical conduct of contractor employees by Government personnel was required. (Appendix, p. 26a.)

We believe the standard used by the Court of Appeals was wholly correct. It was, of course, completely consistent with this Court's holding in *Kelly.* And, it

makes sense in the present context. As both the Court of Appeals and this Court have recognized, in its contracts with private industry, "the Government may fix specific and precise conditions to implement federal objectives." *United States* v. *Orleans,* 425 U.S. 807, 810 (1976). Likewise, this Court has concluded that contact at the supervisory level between parties to a contract "is not direction or control but rather the passing of information and the accommodation that is obviously required in a large and necessarily coordinated operation." *Kelly* v. *Southern Pacific Co., supra,* 419 U.S. at 330.

Thus, any standard applied to assess the legality of supervision by Government personnel over contractor employees must take these wholly legitimate Government requirements into account. If the vice to be prevented is having Government's personnel direct the work of a contractor's employees, a showing of continuous supervision of the physical conduct of a large number of the contractor's employees is the only standard which bears any relationship to this vice. This is precisely the view adopted by the Court of Appeals.

Thus, there is no basis for setting aside the standard of supervision adopted by the Court of Appeals for reviewing the legality of NASA's contract administration.

2. The Court of Appeals Correctly Applied This Standard to the Contracts in Issue

The record before the Court of Appeals was overwhelming that, as found by the Civil Service Commission, improper supervision of contractor employees by NASA personnel did not exist at MSFC. The Court of Appeals' own words say it best:

"The situation here involves NASA entering into written contracts with various companies to perform special services. In each contract, NASA looked to the company that hired the individuals to perform certain tasks. However, the individual companies, not NASA, were to furnish the necessary management and personnel. *It was the responsibility of each company to supervise, control, and direct the performance of its own employees in fulfilling the contract's requirements.* These contracts required the companies to exercise their independent judgment. This is the classic independent contractor relationship.

"In actual operation, in those instances which come closest to the employee borderline, NASA generally gave specific orders, usually to the company supervisor, for certain articles and services. '[T]he *contractor* [not his employees] were told what to do, when to do it, how it was to be done, the qualification requirement[s] for his key people, how and when to report [on] activities, etc.' (J.A. 454). But *the cont[rol] [over] the performance of such requests and the r[esponsibili]ty for the manner in which they would be carried out was in the contracting party and its supervisors.* Thus, the specificity of the requests did not transcend the fact that the *actual on-the-spot supervision employed to produce compliance was carried out by the contracting company and its employees* . . . . This was particularly apparent in a great many of the contracts here because a substantial portion of the contractually acquired services which are in question involved scientific, engineering, technical, and other highly skilled or professional personnel who were fully capable of exercising independent judgment in performing their services and were expected to do so." (Appendix, pp. 21a-22a.) (Emphasis in part in original and in part supplied.)

Petitioners raise no facts in the record below to dispute these findings. Indeed, the record below is unquestioned that:

(a) NASA issued very specific directives to its own personnel precluding supervision of contractor employees. As the Civil Service Commission found, each Federal official responsible for the operation of a support service contract at MSFC was expressly directed by NASA to:

> "Prevent employer-employee relationships between Government Technical Representatives and contractor employees including:
>
> (1) Government personnel interviewing prospective contractor employees;
>
> (2) Work assignments made directly to contractor personnel by the Government representatives and interim direction and control of such work except as between the Government's and the contractor's supervisors;
>
> (3) Interference with the contractor's personnel administrative prerogatives; and
>
> (4) Approval of time cards and absences of contractor employees by Government representatives." (*E.g.*, Joint Appendix, p. 646.)

(b) The evidence was uncontroverted that the foregoing contract provisions were obeyed by NASA personnel in the administration of the MSFC contracts. After conducting numerous on-site inspections and collecting hundreds of affidavits, there was not a single support service contract at MSFC in which the Civil Service Commission found *any* evidence that civil service employees directly supervised the performance of contractors' employees. Indeed, many of the reports

prepared by the Commission contained an express finding to the effect that:

> "In the course of this inquiry no evidence of day to day supervision by Government personnel over contractor employees was found." (Joint Appendix, p. 685.)

As the Commission noted in one of its reports, "[d]irect supervision by civil service personnel over contractor personnel or vice versa is known by both sides, *i.e.*, contractor and civil service, to be improper . . . ." (Joint Appendix, p. 1021.)

3. The Court of Appeals did not Abdicate Its Judicial Responsibility to the Civil Service Commission

In another of their efforts to create an inflammatory issue, the petitioners assert that the Court of Appeals improperly abdicated its judicial responsibility by relying on the investigation of the legality of the MSFC contracts conducted by the Civil Service Commission, instead of coming to a judicial resolution of the contracts' legality. (Petition, pp. 22-24.) It is asserted that this conflicts with *Wheelabrator Corp.* v. *Chafee,* 455 F.2d 1306 (D.C. Cir. 1971), and the Administrative Procedure Act. Once again, however, the petitioners' argument is without foundation.

First, as a review of the Court of Appeals' opinion shows, the Court's conclusion with respect to the legality of the MSFC contracts was, in the first instance, based on the Court's own exhaustive analysis of the record and *not* on the conclusions of the Civil Service Commission.

Second, the Court did not abdicate any judicial responsibility to the Commission. Instead, as an alter-

native holding, the Court of Appeals concluded that the District Court had no basis for disregarding the Commission's actions. As the Court of Appeals found, citing its own decision in *Wheelabrator,* "[t]he district court was not required to send this matter to the Civil Service Commission, but it chose to do so in an exercise of its discretion." (Appendix, pp. 27a-28a.) Having done so, the Court of Appeals concluded that the District Court was not free simply to disregard the Commission's well-supported findings and conclusions that improper supervision did not exist. Instead, the Court reasoned that since there was "substantial support in the record for the Commission's conclusions" as to the contracts, the District Court should have followed those conclusions. (*Id.,* p. 29a.)

CONCLUSION

For the foregoing reasons, we respectfully submit that the petition for a writ of *certiorari* should be denied.

Respectfully submitted,

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